Submission 2 on Queensland Rail's 2013 Draft Access Undertaking

1. Introduction

1.1 Xstrata and its participation in the regulatory process

Xstrata Queensland Limited (***Xstrata***) is providing this submission in respect of the Xstrata Copper and Xstrata Zinc operations which currently utilise access to the Queensland Rail (***QR***) below rail network from Xstrata's Mount Isa and Ernest Henry operations to the port of Townsville.

The efficient, certain and reasonably priced provision of access to those parts of QR's network remains a critical part of ensuring that long term investments that Xstrata has made, and continues to make, in copper, zinc, magnetite and lead operations remain economic.

Accordingly Xstrata has actively participated in the consultation and regulatory processes to this point, including:

- participating in the consultation processes undertaken by QR;
- making submissions to the Queensland Competition Authority (***QCA***) regarding consideration of Queensland Rail's, now withdrawn, 2012 draft access undertaking (the ***2012 DAU***);
- making an initial submission to the QCA regarding consideration of Queensland Rail's 2013 draft access undertaking (the ***Initial Submission***); and
- attending the four QCA hosted workshops on the issues covered in this submission.

Xstrata appreciates QR and the QCA continuing to engage with Xstrata in respect of the draft access undertaking that has ultimately been submitted by QR (the ***2013 DAU***).

1.2 Suggested way forward in light of continuing issues

It was clear from the recent QCA workshops that stakeholders have numerous remaining concerns with the 2013 DAU.

In relation to the issues within the scope of this submission, Xstrata notes QR's indications in the workshops that it was 'willing to take away' many of the issues. However, QR has been unwilling or unable to indicate what variations it would be willing to make at the time this submission was written. Unfortunately that has left Xstrata with no option but to make detailed submissions about the numerous defects in the 2013 DAU (including on points that it appeared QR may be willing to concede).

QR has had substantial opportunities through the 2012 DAU and 2013 DAU process to date to respond to the numerous stakeholder concerns that have not been addressed. In light of QR's unwillingness to address clear defects in the 2013 DAU without compulsion from the QCA, Xstrata submits that the QCA should simply proceed to a draft decision

refusing to approve the 2013 DAU and setting out the manner in which the QCA requires the 2013 DAU be amended.

2. Scope of this Submission

The Initial Submission was intended to cover Xstrata's concerns regarding the 2013 DAU other than in relation to the five issues which were the subject of recent QCA workshops (above rail operational issues, Western System pricing, the proposed standard access agreement, Mount Isa pricing and investment framework matters).

This submission therefore only relates to Xstrata's concerns in respect of:

- Mount Isa pricing;
- above rail operational issues;
- investment framework matters;
- the proposed standard access agreement (***SAA***) (and the principles in Schedule C); and
- related matters discussed in the QCA workshops.

Accordingly this submission needs to be read in conjunction with Xstrata's Initial Submission to gain a full appreciation of Xstrata's concerns in respect of the 2013 DAU.

3. Executive Summary

Xstrata considers that the QCA should refuse to approve the 2013 DAU in its current form.

In respect of the topics covered by this submission its primary concerns are:

Mount Isa pricing (section 4):

- the 2013 DAU requires insufficient transparency and disclosure from QR in access negotiations, creating an information asymmetry in negotiations that prevents the negotiate-arbitrate model from restraining QR setting access charges in a way that abuses its monopoly power;
- the information asymmetry needs to be fixed by way of greater disclosure obligations on QR in access negotiations;
- it is inappropriate to set DORC valuation as the pricing methodology when QR does not know the current DORC valuation of most parts of its network and no information has been provided about how that may impact on access charges for various users;
- the proposed Margin above the Risk Free Rate is excessive when compared to the risk profile QR is proposing to accept in the 2013 DAU; and
- QR's incentives to conduct maintenance and provide contracted volumes are insufficient, and this should be fixed by providing economic incentives through a 80% cap on take or pay obligations and prohibitions on any exclusion of claims for

non-provision of access until a specified threshold of contracted services have not been operated.

Above rail operational issues (section 5):

- the consultation and dispute regime in relation to amendments to the Operating Requirements Manual should extend to end users (i.e. haulage customers);
- amendments to protocols, standards and other documents (other than legislation) referred to in the Operating Requirements Manual should be treated as amendments to the Operating Requirements Manual;
- all amendments to the Operating Requirements Manual should be subject to the consultation regime;
- the grounds for when amendments to the Operating Requirements Manual should be excluded from the dispute regime should be narrower;
- the grounds for when amendments should be able to be overturned should be wider and all cover amendments which materially increase the costs of access to Access Holders or end users, or which are likely to prevent or materially hinder utilisation of a contracted Train Service Entitlement;
- there is no provision for compensation for above-rail operators – which is likely to result in operators having to seek to pass on 'network change risk' to end users via cost pass throughs or higher haulage charges;

Investment framework (section 6):

- there should be an obligation to invest in limited cases – to ensure the network can meet contracted train service entitlements and where certain feasibility, safety and other requirements are protected and the terms of the user funding have been agreed or arbitrated;
- the user funding principles need to be more balanced to protect Users given user funding is being put forward as the method by which users can restrain QR from achieving monopoly pricing in connection with an expansion;
- there needs to be greater protections around the access conditions that can be sought by QR;
- the undertaking should include a master planning regime;
- the undertaking should include robust and balanced principles to apply to negotiation of connection agreements;

Proposed standard access agreement (SAA) and Schedule C (sections 7, 8 and 9):

- there should be either a standard access agreement for bulk minerals concentrate services on the Mount Isa line or provision in the undertaking for which clauses of the SAA would apply to such services and the different positions that would apply in respect of any remaining clauses;
- the Schedule C principles are so high level as to provide no protection in relation to a number of critical issues;

- there should be an end user access agreement (under which an end user can contract access rights without having to have primary liability for operational matters);
- the proposed dangerous goods liability regime should not apply to Class 9 Miscellaneous Dangerous Goods (or at least copper and zinc concentrates) and should not apply where the claim or loss was caused or contributed to by QR; and
- there are numerous other issues with detailed provisions of the SAA, including particularly QR's proposals for a reduced maintenance obligation and substantially reduced risk profile in relation to liabilities and indemnities.

4. Mount Isa pricing

4.1 The proposed negotiate-arbitrate model

QR has proposed in the 2013 DAU that there only be reference tariffs in relation to access rights relating to coal mines using the Western System. Consequently there is no reference tariff that will apply to access to train services utilising the Mount Isa line.

As Xstrata indicated at the QCA Mount Isa pricing workshop, it considers it would be appropriate for there to be no reference tariff, *provided QR makes the changes to its approach to pricing and transparency in access negotiations (as noted below) which are critically required to make the negotiate-arbitrate model more effective at preventing QR's abuse of its monopoly power*.

4.2 Mount Isa line

The issues in this section are raised in the context of access charges for services using the Mount Isa line, which QR acknowledges is a profitable line where it is generally setting access charges having regard to its assessment of the ceiling price.

For services where there is no or low risk of QR exercising its monopoly power in relation to pricing (i.e. those being priced below the floor price or subsidised by the State government or where reference tariffs would apply), Xstrata can understand the QCA forming the view that the additional disclosures proposed in section 4.3 of this submission should not apply.

4.3 Transparency and Asymmetric Information

A negotiate-arbitrate model will only be effective at preventing a monopoly access provider from setting access charges in a manner which constitutes an abuse of monopoly power if the access seeker has enough information to determine whether QR's proposed pricing is a reasonable price or an abuse of monopoly power.

It is clear that the 2013 DAU would not require QR to disclose sufficient information to access seekers to effectively make that judgement. The closest the 2013 DAU comes to useful disclosure obligations in this regard are:

- clause 2.6.2(a)(v) which provides for QR to provide the 'methodology for calculating the Access Charges (including any applicable rates or other inputs for formulae)'; and
- clause 2.6.2(a)(i), which provides for QR to provide 'additional information relevant to the negotiations, as requested by the Access Seeker (acting reasonably)' providing doing so does not breach QR's confidentiality obligations and the information is 'ordinarily and freely available' to QR.

While at first glance those disclosure obligations may appear useful. However, Xstrata considers those apparent protections are illusory and fall substantially short of the level of dislcosure required by section 101 of the *Queensland Competition Authority Act 1997* (Qld) (***QCA Act***). Xstrata is particularly concerned given that section 101 of the QCA Act is 'subject to an approved access undertaking' and considers there is a substantial risk that the lesser disclosure obligations being proposed could, if approved, be read as limiting the disclosures required under section 101 of the QCA Act.

What QR considers constitutes the 'methodology for calculating the Access Charges' is unclear. In negotiations to date, there appears to have been little discernable methodology, rather simply a price that QR considers 'reasonable'. Xstrata remains concerned this paragraph will produce little more than a price with assertions it is based on a 'market price' (which is fairly nonsensical in the context of a monopoly service provider who itself sets the market) or is 'below the ceiling price'.

The extent of the ability to request information is also extremely uncertain (particularly due to being limited to information that is 'ordinarily and freely available to Queensland Rail'). It became evident in the workshops that despite being willing to assert that pricing was 'below the ceiling price' in negotiations, QR is in fact unable to demonstrate with any real certainty the asset value or stand alone costs which would be necessary to accurately determine the ceiling price for an individual access seeker.

Consequently, without amendments access seekers will face the challenge in access pricing negotiations of asymmetric information (i.e. a much lesser awareness of relevant information like the costs involved in providing access, the values of assets utilised and the rate of return being sought, than QR).

If that is not corrected that will result in two likely consequences:

- access seekers accepting pricing that constitutes an abuse of monopoly power due to not understanding the basis upon which the price was derived; and
- access seekers having to bring pricing arbitrations as a matter of course because that is the only way in which it can be certain of gaining a reasonable price.

The fact that arbitration is theoretically always available is not sufficient protection, as even if access seekers wanted to bring pricing arbitrations, many access seekers would not pursue this course due to the costs, delay and complexities which would be involved in such an arbitration.

Whether QR may voluntarily disclose more information to make the negotiate-arbitrate model effective (as QR hinted at the workshops) is irrelevant. Xstrata's experience to date

is that QR has not even been making the disclosures legally required by section 101 of the QCA Act and it is inappropriate for a regulator to simply be relying on the goodwill of a regulated entity on an issue which, if not fixed, completely undermines the validity of the proposed approach to regulating QR's pricing.

Consequently Xstrata considers it is evident that for the negotiate-arbitrate framework to be sufficiently robust to allow access seekers to make informed judgements about pricing it needs to provide an express list of the information required (including information of the type required under section 101 of the QCA Act).

Xstrata submits the 2013 DAU should not be approved without clause 2.6.2 being amended to expressly require provision of the following information:

- information about the price at which the access provider proposed to provide the service, including the way in which the price is calculated (including the values of all inputs into any formula or methodology utilised);
- information about the costs of providing the service, including the capital, operation and maintenance costs (both on a stand alone and incremental basis);
- information about the aggregate current and projected future revenue streams arising from the relevant parts of the network;
- information about the value of the access provider's assets, including the way in which that value calculated;
- an estimate of the spare capacity of the service, including the way in which the spare capacity is calculated; and
- where information is provided about future matters (such as escalations, forecasts or estimates of future costs or revenue), the assumptions on which that information is based and the basis for those assumptions.

4.4 Valuation methodology

Clause 3.2.3(c) seeks to prescribe the Depreciated Optimised Replacement Cost methodology (***DORC***) as the asset valuation method to be used in determining the ceiling price for access charges.

It is however clear that QR does not actually know with any real certainty what the current DORC valuation of any of the parts of its network is (with the potential exception of the Western system).

There are numerous possible valuation methods that could be used (and which methodology is suitable will depend on factors like the nature and age of the infrastructure and its likely future use). QR has been quick to point out the varied nature of its network, and presumably that has the potential to result in different valuation methods being appropriate for different parts of its network.

In that context, it seems highly inappropriate for the QCA to bind itself to applying a DORC valuation methodology in future pricing arbitrations where it is completely unclear whether that will be appropriate for the part of the network to which a future dispute relates and what the consequences for access charges payable by access seekers would actually be.

Therefore Xstrata considers that clause 3.2.3(c) should simply be deleted and the ceiling revenue limit formula should simply refer to the 'value of assets' without specifying the valuation methodology. That will allow the QCA to make an informed decision about the proper valuation methodology in the event of future pricing arbitrations occurring.

Xstrata submits the 2013 DAU should not be approved without:

- clause 3.2.3(c) being deleted; and
- the references to asset values being assessed in accordance with clause 3.2.3(c) being deleted from clause 3.2.3(a).

4.5 Weighted average cost of capital (WACC)

Xstrata notes that the WACC requested is not dissimilar to the weighted average cost of capital used for the purposes of the Aurizon Network's access undertaking which applies to its central Queensland coal region network (the ***Aurizon Access Undertaking***). However, if the Authority is minded to accept any of the reduction in risk profile for QR that would result from accepting QR's position on other aspects noted in this submission (particularly the positions on liabilities and indemnities noted in section 9.5), then Xstrata considers that the WACC should be closer to the risk free rate (i.e. the 'Margin' should be reduced from that proposed by QR).

It should also be clarified that paragraph (b) of the WACC definition also provides a nominal post-tax rate (consistent with paragraph (a)).

Xstrata submits the 2013 DAU should not be approved unless the liability and indemnity regime provided for in the standard access agreement is returned to that which currently applies to QR (under the existing standard access agreement and the equivalents of the Schedule C principles).

If there is any reduction in QR's risk profile that is accepted the 'Margin' should be reduced from the 4.77% rate suggested to reflect the reduction in risk accepted by the QCA.

Paragraph (b) of the definition of WACC should also specifically provide a nominal post-tax rate.

4.6 Providing the right economic incentives – take or pays caps and allowable thresholds for non-provision of access

Xstrata is concerned that the investment framework and maintenance obligations proposed in the 2013 DAU establish a regime which will reduce QR's (already insufficient) incentives to properly maintain the Mount Isa line. Even under the current regulatory arrangements, the Mount Isa line appears to have been under maintained with increasing speed restrictions and outages (and at each contract renewal requests for further funding of deferred maintenance activities by higher access charges or upfront capital investments in maintenance activities).

One way of seeking to fix this would be to provide QR with greater economic incentives to provide the contracted volume. A 100% take or pay access agreement 'blunts' the economic incentives of the service provider to meet contracted volume (particularly when

coupled with a fixed price that QR gains irrespective of whether QR saves costs by not carrying out maintenance activities which were assumed at the time of contracting access).

Therefore, Xstrata submits that unless there is a very substantial increase in the maintenance obligations (including transparency on reporting what maintenance activities are being conducted and an obligation to invest in such maintenance activities), the access charges for the Mount Isa line should be modified in the following ways:

- a cap on take or pay of 80% (being the rate which is proposed to apply to the Western System trains services); and
- prohibition of any concept equivalent to 11.6(d) of the SAA (which excludes liability for non-provision of access unless the total number of cancelled train services exceeds 10% of the contracted train services for the month).

Xstrata submits the 2013 DAU should not be approved unless it contains a cap on take or pay obligations of 80%, and a prohibition on any exclusion of claims for non-provision of access until a specified threshold (either in number, value or proportion) of contracted services have not been operated (at least for access charges on the Mount Isa line).

5. Above rail operational issues

5.1 Amendments to the Operating Requirements Manual – recognition of end users

QR proposes to consolidate a number of above rail operational documents into the Operating Requirements Manual (the ***ORM***). As a result the ORM is the key document in relation to the above rail operational requirements that have to be complied with by users of the network.

Access holders and end users will contract for long periods, generally 10 years, on the basis of assumptions about the above rail operating requirements that will apply during that contract period. While amendments to the ORM will be necessary for time to time, amendments made part way through the terms of an access agreement and related haulage agreement will clearly have the potential to adversely impact both above rail operators and the end user's they provide haulage services to.

QR's proposed clause 4.2 of the 2013 DAU does not given any recognition to impacts on end users. However, where haulage is being contracted partly based on assumption about above rail operational issues, and haulage agreements may pass through to end users all or part of any additional access related costs, it is hard to see why end users are any less likely to be detrimentally affected.

Accordingly Xstrata submits that the notification and consultation regime regarding amendments in clause 4.2.2 needs to be amended to include end users.

Xstrata submits the 2013 DAU should not be approved without:

- clause 4.2.2(c) being amended so that 'materially adversely affect an Access Holder' is replaced with 'materially adversely affect an Access Holder or its Customer'

- clause 4.2.2(f)(i) being amended so that 'notify all Access Holders and Access Seekers' is replaced with 'notify all Access Holders, ~~and~~ Access Seekers and Customers'
- consequential changes being made to other provisions in 4.2.2 and 4.2.3 such that all references to Access Holders or Access Seekers also include their Customers

If the QCA considers the above amendments impose too greater a burden on QR, Xstrata could accept that it may be reasonable for the references to 'Customer' being restricted to 'Major Customers' defined by reference to having contracted with operators a reasonable minimum number of train services per annum.

5.2 Amendments to the Operating Requirements Manual – clarifying what constitutes an amendment

The ORM contains reference to a number of standards and protocols – which can be critically important to the access provided. For example, clause 6.7(b) of the ORM requires operators to comply with the Network Business Master Train Plan Protocols, the Network Business Daily Train Plan Protocols and the Network Business Possession Planning Protocols. Those protocols are critical to determine what train services are actually scheduled.

Xstrata considers it should be made absolutely clear that amendments to those documents are also within the scope of the provisions regarding amendments to the ORM (as technically it could be argued that if the content of such a protocol changes the ORM has not changed as it still just requires compliance with the same protocol).

Xstrata submits the 2013 DAU should not be approved without the following new paragraph being included in clause 4.2.2:

(h) For the avoidance of doubt, an amendment to a standard, protocol or other document (other than legislation) referred to in the Operating Requirements Manual will be deemed to be an amendment of the Operating Requirements Manual for the purposes of clause 4.2.2 to 4.2.4.

5.3 Grounds for amendments being excluded from the consultation and dispute regimes

Clause 4.2.2(b) and Clause 4.2.3(a) have the effect of excluding from the consultation and dispute regimes respectively amendments to the ORM made on certain grounds.

Xstrata does not understand why consultation is something that should be avoided even where based on grounds like safety or Material Change (which includes changes in law). Many 'safety changes' are based on achieving a particular outcome and there is likely to be multiple ways in which that outcome could be achieved. Consultation with above rail operators and end users may in fact result in a more efficient change being made which achieves the desired safety outcome but with lesser costs or disruption.

Consequently Xstrata considers the exclusion of certain amendments from the consultation provisions should be removed.

In relation to disputes, Xstrata considers that:

- clause 4.2.3 needs to be redrafted to ensure that it is possible to dispute whether the grounds in clause 4.2.3(a) do effectively exist (as the clause as currently drafted could be read as excluding the entire dispute regime as soon as QR asserts the amendments were based on such a ground); and
- clause 4.2.3(a)(iii) needs to be entirely deleted or made much narrower in scope – as its current drafting would allow (outside of the dispute regime) pretty much any change that QR wishes to make. If there are particular changes envisaged, or particularly sensitive parts of the network (such as the Brisbane metropolitan system due to the passenger services operated on that part of the network), then it may be appropriate to retain something like this paragraph but restrict it to a particular change envisaged as being implemented during the regulatory term or changes to a particular sensitive region of the network. If that was proposed the reasonableness of that narrower exclusion could be considered as part of this regulatory process.

Xstrata submits the 2013 DAU should not be approved without:

- clause 4.2.2(b) being deleted;
- clause 4.2.3(a)(iii) being deleted (or amended to only apply to particular changes anticipated to be implemented during the regulatory term or only apply to train services utilising a particularly sensitive part of the network – to the extent the QCA considers such charges/parts of the network justify an exclusion); and
- clause 4.2.3(a) being amended to clarify that it is open to dispute whether amendments were made on the grounds referred to in that clause.

5.4 Disputes about amendments to the Operating Requirements Manual

Ultimately the only real protection for above rail operators and end users of detrimental changes to the ORM is a robust dispute process.

The proposed dispute process in clause 4.2.3 is not robust as before a dispute can be brought it requires as a threshold issue that the amendment 'Unfairly Differentiates' (see clause 4.2.3(b)(ii)). Unfairly Differentiates is defined to mean unfairly differentiates between Access Holders in providing Access in a way that has a material adverse effect on the ability of one or more of the Access Holders to compete with other Access Holders. That test is solely concerned with preserving a level playing field between above rail operators.

As a consequence of that threshold, many amendments which would be appropriate to dispute are outside the scope of the dispute regime, particularly being:

- amendments which materially increase costs to all above rail operators;
- amendments which materially increase costs to end users; and
- amendments which prevent or materially hinder a particular access holder or relevant end user being able to utilise contracted train services.

As noted above, Xstrata is also concerned that clause 4.2.3(a) could be read as excluding from the dispute regime any amendments that QR merely asserts would fall within one of

the circumstances referred to in clause 4.2.3(a), when it should presumably remain open to dispute whether amendments were in fact based on such grounds.

Xstrata submits the 2013 DAU should not be approved without:

- it being made clear that it is possible to dispute whether the amendments were made on the grounds referred to in clause 4.2.3(a) were the basis for the amendments (and it is only if they are found to be the grounds for the amendments that the amendments cannot be overturned);
- the references in clause 4.2.3 to 'Unfairly Differentiates' being replaced with 'Unfairly Impacts'
- a new definition of 'Unfairly Impacts' being inserted as follows:

Unfairly Impacts means where the proposed amendments to the Operating Requirements Manual would have, or be likely to have, one or more of the following effects:

(a) unfairly differentiating between Access Holders in providing Access in a way that has a material adverse effect on the ability of one or more of the Access Holders to compete with other Access Holders;

(b) materially increasing the costs of access to an Access Holders or a Customer; or

(c) preventing or materially hindering an Access Holder's utilisation of a contracted Train Service Entitlement (taking into account any resulting impacts of the amendments on the prospects of the Customer's utilisation of its haulage rights with the Access Holder).

5.5 Compensation for above rail operators for changes to the ORM and QR's liability

Xstrata is not currently an above rail operator, but has an interest in above rail operators pricing their haulage services competitively and efficiently. If above rail operators have to take on greater risks of changes to QR requirements occurring which require further above rail investment during the term of a haulage agreement that may result in them either seeking to pass this through to the end user in the haulage agreement or (if the operator assumes the risk) inefficiently having to price in a degree of network change risk.

Consequently, Xstrata submits that the existing position regarding compensation for changes to Systemwide Requirements (as it appears in the existing standard access agreement) should continue to apply.

Clause 4.2.4 (which basically excludes all liability for changes to the ORM which QR believed were in compliance, even if they in fact were not) would need to be amended to reflect that position. Clause 4.2.4 is far too wide in any case – as QR should know the ground on which the change is being made, and a primary purpose of the consultation process is to determine whether a proposed change would be non-compliant. Consequently clause 4.2.4 should either be deleted or limited to urgent safety based changes (where there arguably might be insufficient time to identify the consequential impacts of such changes).

Xstrata submits the 2013 DAU should not be approved without reintroducing the existing provisions regarding compensation for changes to 'Systemwide Requirements' in the

existing standard access agreement so they apply to amendments to the Operating Requirements Manual (and amending clause 4.2.4 to be consistent with that position).

Clause 4.2.4 should either be deleted in its entirety or amended to reflect the provisions regarding compensation for changes to Systemwide Requirements and otherwise limited to only applying to 'urgent safety based changes'.

5.6 Network Management Principles

As noted in the section 7.4 of the Initial Submission, Xstrata has substantial concerns with changes to the Network Management Principles which give QR even greater rights to impose operational constraints without consultation or agreement with the adversely affected access holder. Where changes are being made to the master or daily train plan that are effectively taking away contracted services. That is not a step which should be taken lightly (given QR's capacity modelling will already have made allowances for the impacts of such constraints) such that it is appropriate that such changes require consultation and agreement.

Xstrata submits the 2013 DAU should not be approved without reversing the changes to clauses 1.1(g), 1.1(h) and 1.1(f)(ii) which were made compared to the 2012 DAU.

5.7 Content of the Operating Requirements Manual

Xstrata understands that both operators have concerns with aspects of QR's proposed content for the ORM. Xstrata considers it is likely to share many, if not all, of those concerns. If it would assist the QCA, Xstrata would be happy to subsequently identify the concerns raised by operators about the ORM that it shared.

6. Investment framework matters

6.1 Extent of an obligation to invest

Clause 1.4.1 of the 2013 DAU provides extremely limited circumstances in which QR can be required to invest in an Extension. Given the number of items on which QR's opinion, satisfaction or discretion is involved – the current clause 1.4.1 effectively gives QR complete discretion as to whether it should be required to make an investment in an Extension.

Queensland Rail's supporting submission indicates that these limitations are based on the restrictions in section 119 of the *Queensland Competition Authority Act 1997* (Qld) (***QCA Act***). That is incorrect. Firstly, Xstrata notes that that section does not restrict what can be included in the terms of an access undertaking, rather it restricts the decisions the QCA can make in an access determination. The terms of the QCA Act concerned with the content of undertakings (s 137) and enforcement of undertakings (s 152) contain no such restrictions. In fact s 119(4) expressly provides for consistency with a requirement imposed under an approved access undertaking submitted in the way the 2013 DAU was to empower the QCA to require an extension despite the access seeker not having funded the Extension. Secondly, the limitations Queensland Rail proposes in clause 1.4.1 go well beyond those imposed by section 119 QCA Act in any case.

Xstrata is concerned that for profitable lines where access holders or end users have the ability and potential willingness to fund Extensions, the position proposed by QR will lead to a tendency to defer and delay proper maintenance costs, knowing that:

- access charges on its network are generally fixed at a certain rate without any 'look through' or 'adjustment' for actual maintenance costs or network performance; and
- the end user or Access Holder has made long term investments requiring continuing access, such that they will effectively be forced to finance upgrade (or previously deferred maintenance) of the mainline at the next renewal.

To mitigate those issues, Xstrata considers it would be appropriate for the 2013 DAU to impose a clear obligation on QR to invest in:

- Extensions required to maintain the line at sufficient capacity to meet contracted access rights;
- Extensions where the requirements in clause 1.4.1(a)(vii), (viii), (ix) and either:
  - QR is willing to fund the Extension; or
  - user funding agreements have been entered in respect of the Extension (either by agreement or following the end user or access holder accepting entry into a user funding agreement on the terms arbitrated by the QCA under the dispute regime).

Xstrata's particular concerns with clause 1.4.1 are that:

- in 1.4.1(a)(iii)(A) it should be made clear that:
  - providing funding 'in advance' only requires providing funding in a staged manner as construction progresses (not providing all funding for the Extension in one lump sum before construction starts);
  - 'terms and conditions satisfactory to Queensland Rail' should be 'terms and conditions reasonably satisfactory to Queensland';
- the requirement in clause 1.4.1(a)(iv) that Queensland Rail bears no cost or risk in relation to constructing, owning, operating or managing the Extension:
  - is clearly inappropriate for certain Extensions (see section 6.2 of this submission);
  - is inconsistent with every access agreement QR has previously signed which involves it bearing a degree (albeit very limited) or risk in relation to operation and management of the Network;
  - goes well beyond the prohibition in s 119(2) QCA Act against requiring the access provider to 'pay some or all of the costs of extending the facility';
  - is already covered to the extent that it is legitimate, by the reference in 1.4.1(a)(vii) to not 'adversely affect Queensland Rail's legitimate business interests';

and should therefore be limited to ensuring QR bears no costs of constructing the Extension;

- obtaining Authorisations and land access (1.4.1(a)(v) and (vi)) is something which should be done by QR (because it is going to be difficult and more costly (if not impossible), for an operator or end user to obtain authorisation for conduct to be carried out by QR itself);
- the matters in clause 1.4.1(a)(vii) should be tests to be satisfied objectively – not matters determined in Queensland Rail's opinion;
- it is not clear what clause 1.4.1(a)(vii)(C) adds to clause 1.4.1(a)(iv)(B);
- the requirement in clause 1.4.1(a)(vii)(D) that there is no adverse affect on Capacity should be qualified so that a minor degree of incidental disruptions during construction and development are permitted – otherwise it will nearly be impossible for an Extension to meet this requirement;
- 1.4.1(a)(viii) presumably only needs to refer to access agreements having been executed (and if QR has executed them they should not then be able to disown them by alleged they are not on terms and conditions satisfactory to QR, which is what the current drafting suggests);
- it will not always be appropriate to require that 100% of the additional capacity created by the Extension is contracted, such that 1.4.1(a)(viii) should be amended so that it is satisfied if the access charges reflect a return on 100% of the Extension (potentially diminishing or allowing for a rebate when future users are contracted);
- as it is, it is not clear to Xstrata than QR would be required to accept investment on the basis of arbitrated user funding terms.

Xstrata is conscious that section 119(1) prohibits the QCA from making an access determination that is inconsistent with an approved access undertaking for a declared service. As the dispute provisions in this undertaking rely on the QCA utilising those access determination powers, if the QCA approves an undertaking including clause 1.4.1 in its current form, Xstrata is concerned that the QCA will have effectively prevented itself being able to make a future determination regarding the terms on which an Extension can proceed if an access dispute arises and Queensland Rail refuses to do so on the basis of one of the discretions provided to it by clause 1.4.1.

Clause 1.4.5(a) would be completely inconsistent with the changes noted above and would also need to be deleted.

Xstrata submits the 2013 DAU should not be approved without a positive obligation on QR to invest in:

- Extensions required to maintain the line at sufficient capacity to meet contracted access rights; and
- Extensions where the requirements in clause 1.4.1(a)(vii) (amended as noted below), (viii), (ix) are met and either QR is willing to fund the Extension or user

funding agreements have been entered in respect of the Extension (on agreed or arbitrated terms).

Clause 1.4.1(a)(iii)(A) should be amended so:

- it is clearer that providing funding 'in advance' only requires providing funding in a staged manner (not providing all funding for the Extension in one lump sum before construction starts;
- 'terms and conditions satisfactory to Queensland Rail' is replaced with 'terms and conditions reasonably satisfactory to Queensland

Clause 1.4.1(a)(iv) should be limiting to QR not bearing any cost in relation to constructing the Extension.

Clause 1.4.1(a)(vii) should be amended so (A)-(F) are matters to be satisfied objectively, not matters to be determined in QR's opinion.

Clause 1.4.1(a)(vii)(D) should permit an adverse impact on the capacity provided it is merely incidental disruptions during construction and development.

Clause 1.4.1(a)(viii) should delete the words 'on terms and conditions satisfactory to Queensland Rail' and should be amended so that it is satisfied if the access charges reflect a return on 100% of the Extension (potentially diminishing or allowing for a rebate when future users are contracted) even if the capacity contracted is not equal to exactly 100% of the additional capacity created.

Clause 1.4.1(a)(v), (vi), (vii)(C), and (x) and clause 1.4.5(a) should be deleted.

6.2 Insufficient recognition of the different types of Extensions

Extension is defined as 'includes an enhancement, expansion, augmentation, duplication or replacement of all or part of the Network (excluding Private Infrastructure)'. It is evident that will include a wider variety of infrastructure, including:

- separate infrastructure – such as a rail spur or elongation of the network; and
- upgrades to the mainline – resleepering, changes in signalling, duplication or a passing loop.

Clause 1.4.1 to 1.4.3 seem to have been drafted to suit the former type, and as a consequence are highly inappropriate for the second type.

In particular a provision that QR bears no cost or risk in relation to operating or managing upgrades to the mainline is completely inconsistent with QR's obligations under access agreements (which provide a specific liability regime which covers operating and managing the network). It is also clear from 1.4.3(b)(iv) that QR wants to continue to receive funds in relation to owning, operating, managing or investing in the network (i.e. it is seemingly seeking a position of no risk, but continued reward).

Xstrata considers that, given the complexity of a set of principles sufficiently adapted to these two different forms of Extension, the baseline principle should be appropriate to the upgrades to the mainline category, and then it is left as a matter for individual funding

agreements to negotiate additional issues particularly where the Extension is identifiably separate infrastructure.

Clearly both of those types of Extension should be subject to the user funding regime.

6.3 One-sided nature of proposed principles for user funding

Given the current pressure on the State's budget it cannot be assumed that QR will be willing to fund Extensions even where a private below rail operator would consider it economically feasible to do so. In addition a provider of natural monopoly infrastructure has an economic incentive to limit capacity in order to generate monopoly returns (unmitigated in Queensland Rail's case by the potential for a vertically integrated haulage business to also gain haulage revenue from any such Extension). As the QCA recognised in its decisions on the Aurizon Access Undertaking, user funding arrangements assist in mitigating these risks by providing a degree of countervailing power to access seekers.

Consequently, in order to ensure that the capacity of the Network continues to expand where justified by new demand, it is important that there is a robust user funding model.

Clause 1.4.1(b) 2013 DAU merely provides an obligation to use reasonable endeavours to negotiate a user funding agreement. At a bare minimum clause 1.4.1(b) should reflect clause 7.5 of the ARTC's Hunter Valley Access Undertaking which provides for good faith negotiations and an express power for the regulator to arbitrate the terms of user funding arrangements where agreement is not reached.

The difficulty with such a provision is that, as has become evident during the process occurring under the Aurizon Access Undertaking to submit a form of standard user funding agreement, the detailed terms of a user funding agreement can have a substantial impact on whether user funding provides a credible and economically efficient alternative for access seekers.

Given the complexities of user funding, Xstrata considers it may be appropriate for QR's undertaking to be limited to principles (similar to the approach included in the 2013 DAU), *provided those principles are even handed* – which the provisions of the 2013 DAU are not.

Xstrata submits the 2013 DAU should not be approved without the principles requires in clause 1.4.2 being amended as follows:

Without limitation to clauses 1.4.1 and clauses 1.4.3 to 1.4.6, a Funding Agreement must, unless otherwise agreed by Queensland Rail and the relevant User:

(a) be consistent with the terms of this Undertaking;

(b) not provide for Queensland Rail to obtain a greater return on capital than that included in Access Charges in accordance with this Undertaking (subject to the User having audit rights to demonstrate compliance with this principle);

(c) result in the transaction between structured in a reasonable way that does not adversely affect Queensland Rail or the User in respect of tax, duty and accounting treatments

(d) ensure Queensland Rail's and the User's legislative business interests are protected and not adversely affected;

(e) not result in Queensland Rail bearing any cost ~~or risk:~~

~~(i) in relation to constructing, owning, operating or managing~~ an Extension~~; or~~

~~(ii) as a result of the structure or terms of the Funding Agreement;~~

(f) require Queensland Rail to use reasonable endeavours to ensure that an Extension is:

(i) constructed efficiently and in accordance with Prudent Practices taking into account all of the relevant circumstances (including Queensland Rail's relevant safety and construction requirements);

(ii) operating and managed by Queensland Rail in a manner that is consistent with Queensland Rail's operation and management of the Network but subject to all of the relevant circumstances (including the specific operational and management needs of the Extension and the needs of existing Access Holders); and

(g) satisfy the requirements set out in clause 1.4.3.

6.4 Rebates

While Xstrata considers the approach to rebates to be generally acceptable, it is concerned about what will be interpreted as constituting an 'adverse affect' on QR (under 1.4.3(b)(ii)) – as in one sense, having to pay any rebates is 'adverse' to QR.

The other provisions in 1.4.3 seem to cover the possible adverse effects which might legitimately result in payment of a rebate not being made, such that clause 1.4.3(b)(ii) should be deleted.

Xstrata submits the 2013 DAU should not be approved without clause 1.4.3(b)(ii) being deleted.

6.5 Access Conditions

There are no restrictions in the 2013 DAU on the circumstances in which QR can request access conditions or the extent of access conditions which it can require.

Xstrata requests that the QCA require QR to incorporate similar protections to those that exist in the Aurizon Undertaking, particularly the general principle in clause 6.5.2 of the Aurizon Undertaking that access conditions can only be imposed to the extent reasonably required in order to mitigate exposure to the financial risks associated with providing access to the access seeker's proposed train service(s). Any access conditions which do not meet criteria of that nature are an exercise of monopoly power that any approved undertaking should be designed to prevent.

Without such a protection, it would be open to Queensland Rail to undermine the terms of access the undertaking appears to provide, by requiring access conditions such as:

- additional fees which bear no relationship to the costs or risks involved in provision of access and that raise the total cost of access above the limits on access charges provided in the 2013 DAU; or

- agreements not to raise access disputes with the QCA.

The user funding and rebate provisions included in the 2013 DAU do not resolve these issues – as non-financial access conditions are an issue as well, and financial access conditions that are not related to investment in a particular piece of infrastructure would not be captured by the proposed user funding and rebate regime.

In theory the appropriateness of access conditions could be left to be resolved by the QCA arbitrating access disputes, but a guiding principle regarding the types of access conditions which would be appropriate would be useful in both preventing such disputes and in guiding the outcome of any such arbitration before the QCA.

Xstrata submits the 2013 DAU should not be approved without inclusion of similar protections to those that exist in the Aurizon Access Undertaking regarding access conditions, particularly the general principle in clause 6.5.2 Aurizon Access Undertaking that access conditions can only be imposed to the extent reasonably required in order to mitigate exposure to the financial risks associated with providing access to the access seeker's proposed train service(s).

6.6 Master planning regime

As noted above, Xstrata is increasingly concerned that there has been insufficient investment in the Mount Isa line. It is concerned that investments identified in QR's public planning documents as investments that QR is committed to undertaking as part of maintaining the line, seem to morph into requests for funding for the same investments which are then rebranded as being necessary to meet a particular access request.

Xstrata considers that to arrest the declining performance of the line it is necessary for the undertaking to prescribe a Master Planning regime which would involve:

- publication of performance metrics for the Mount Isa line (and other lines subject to the regime) in terms of cancellations, outages and speed restrictions ;
- reporting on the cause of cancellations, outages and speed restrictions;
- consultations with the operators and customer groups about the issues and potential methods of rectifying those issues;
- proposed investments and maintenance activities to rectify those issues; and
- reporting on progress of previously proposed investments and maintenance activities – and outcomes in terms of improvements in performance of the line.

This is not intended to be a way of forcing QR to make investments in expansion capacity – rather it is a way of making transparent what QR is actually doing in terms of sustaining capital expenditure and maintenance programs. If such reporting reveals continuing under-investment that is something that can be addressed further in the next regulatory term.

Xstrata submits the 2013 DAU should not be approved without including a master planning regime which would involve:

- publication of performance metrics for the Mount Isa line (and other lines subject to the regime) in terms of cancellations, outages and speed restrictions ;

- reporting on the cause of cancellations, outages and speed restrictions;
- consultations with the operators and customer groups about the issues and potential methods of rectifying those issues;
- proposed investments and maintenance activities to rectify those issues; and
- reporting on progress of previously proposed investments and maintenance activities and outcomes in terms of improvements in performance of the line.

6.7 Connection Agreement

Any new mine developments will often require a connection agreement to connect a mine spur to the existing network in order to make any use of the access rights sought. Xstrata considers that clause 2.6.2(b) is not sufficiently robust to prevent the connection agreement being an impediment to gaining access on reasonable terms, because:

- it only applies during the negotiation period (when there are circumstances where a connection agreement could need to be negotiated part way through the term of an access agreement – such as on the expiry of an existing connection agreement); and
- it provides no guidance or limits regarding the terms of a connection agreement.

Given connection agreements are negotiated in a context where the entity connecting the private infrastructure has no choice but to connect to the network, QR is in the position of a monopolist and, without limitations in the undertaking, could force the private infrastructure owner to accept terms reflecting that monopoly power.

At a minimum, Xstrata suggests the 2013 DAU should include the following set of principles for connections (based on what the QCA considered appropriate in clause 8.3 of the Aurizon Access Undertaking and the recently approved Standard Rail Connection Agreement for connection to Aurizon's below rail coal network.

Xstrata submits the 2013 DAU should not be approved without clause 2.6.2(b) being deleted and replaced with the following clause:

(a) Queensland Rail will, on request by an owner of existing or proposed rail transport infrastructure (the **Private Infrastructure**) to connect (or keep connected) the Private Infrastructure to the Network, negotiate the terms of an arrangement with the Private Infrastructure Owner for the connection of Private Infrastructure to the Network (the **Connection Agreement**).

(b) Any Connection Agreement must be consistent with the following principles unless otherwise agreed by the Private Infrastructure Owner and Queensland Rail:

(i) the connecting infrastructure meets the technical specifications reasonably required by Queensland Rail for connection to the Network;

(ii) the connecting infrastructure has been constructed to a standard appropriate to the nature of the traffic and the current service standards of the adjoining Network, and there is no adverse impact on safety;

(iii) the connecting infrastructure will not, by virtue of its existence, reduce capacity or supply chain capacity; and

(iv) the Private Infrastructure owner meets the reasonable and efficient initial and continued costs associated with constructing and maintaining the connecting infrastructure (but is not required to pay any margin, profit or additional return to Queensland Rail in respect of the connection),

provided that the Private Infrastructure and any connecting infrastructure cannot be required to be of a standard or to be of any condition which exceeds the standards and condition of the relevant parts of the Network.

(c) Unless otherwise agreed by the Private Infrastructure owner and Queensland Rail:

(i) Queensland Rail has the right to design, project manage, construct, commission, maintain, upgrade and in any other way manage the connecting infrastructure;

(ii) Queensland Rail must:

(A) consult with the Private Infrastructure owner regarding the design of the connecting infrastructure;

(B) use its best endeavours to construct and commission the connecting infrastructure in an efficient and timely manner; and

(C) use its best endeavours to align the scheduling of train services between the Private Infrastructure and the Network.

(d) For clarity, a dispute in relation to the terms of a Connection Agreement is subject to the dispute resolution process under clause 6.1..

If the QCA is not minded to prescribe principles at this stage, then Xstrata considers it will be necessary to include a provision similar to clause 8.4 of the Aurizon Access Undertaking obliging QR to submit a form of standard connection agreement (and related amendments to the access undertaking) during the term of the access undertaking.

7. Scope of Proposed Standard Access Agreement and Schedule C Principles

7.1 No Standard Access Agreement applicable to Xstrata

The standard access agreement proposed in connection with the 2013 DAU is proposed to only apply to coal access rights in respect of the Western System.

Xstrata acknowledges that this is a similar position to what exists under the existing undertaking. However, in past negotiations, Xstrata's experience was that only having a coal standard access agreement provided other users with the 'worst of both worlds', where on occasion the access provider would insist terms had to remain consistent with the standard coal access agreement, but would equally insist on diverging from those terms where it commercially suited them to do so. The Schedule C principles are

supposed to provide protection for other access seekers to which the SAA does not apply, but for the reasons discussed in section 7.2 of this submission they do not do so.

Accordingly, Xstrata considers that more needs to be done to address the access terms which will be provided to other access seekers. Xstrata submits that a change in approach is now warranted given this undertaking is restricted in its application to the Queensland Rail network, and Xstrata's non-coal below rail access rights now represent a much more significant proportion of the network to which access is being regulated than ever before.

Xstrata considers there are basically two ways in which this can be appropriately resolved, being either:

- requiring a new standard access agreement for certain other major types of train services (say bulk minerals concentrates on the Mount Isa line); or
- providing for clauses of the SAA which are to apply to all traffics (as mandatory clauses) and then for certain other major types of train services (such as bulk minerals concentrates on the Mount Isa line) setting out the different positions that are proposed to apply.

Xstrata's experience with past negotiation of access rights for the Mount Isa line is that the then current coal standard access agreement basically provided the access provider's starting point subject to a small number of amendments customised to the product for which train services were being sought. Consequently, providing for the extra variables for certain different types of freight (under either of the approach suggested above) would not be a major imposition.

Xstrata submits the 2013 DAU should not be approved without either:

- a standard access agreement being provided for bulk minerals concentrate services on the Mount Isa line; or
- the undertaking providing which clauses of the SAA would apply to bulk minerals concentrate services on the Mount Isa line and then Schedule C or other provisions of the undertaking setting out the different positions that would be proposed to apply in access agreements for such services.

7.2 Schedule C Principles not sufficiently robust

Xstrata acknowledges the existence of clause 2.7.5(c) and Schedule C, which provides some protections regarding the terms of access which can be requested for other types of train services, but has a number of concerns with the limits of that Schedule.

Many of those concerns also occur in the terms of the SAA and are therefore discussed in section 9 of this submission below, but those concerns equally arise in Schedule C where the same position is expressed in a summarised form.

In addition to those issues, the principles in Schedule C suffer from often being so high level they provide no protections for access seekers in relation to a number of critical issues. For example:

- there is no actual right to carry dangerous goods (even if the reasonable requirements in 8.1(b) and (c) are complied with), rather it is entirely dependent on

receiving agreement/prior permission from QCA - effectively providing no limitations on what Queensland Rail can ask for as a condition of such agreement or permission;

- the liability position is actually worse than in the SAA due to:
  - clause 12(a) Schedule C simply providing 'the liabilities of the parties for default will be limited or excluded as agreed in the Access Agreement' (which evidently provides absolutely no protection); and
  - important issues like liability caps, exceptions to which that cap does not apply, and the circumstances in which Queensland Rail will be liable for non-provision of access in the event of train cancellations caused by its breach or negligence not being fully specified;
- events of default and rights of suspension and termination are simply left to be agreed (clause 13 Schedule C);
- the length of a force majeure event which gives rise to a right to terminate is only described as being 'prolonged' (clause 18(c) Schedule C); and
- the criteria for resumption of access rights are left to be agreed with the only limitation being that the criteria are objective (clause 19.1 Schedule C).

Xstrata understands that QR's concern with making Schedule C more prescriptive is that it applies to all train services (other than those to which the SAA applies). While QR may need some level of flexibility in relation to the term of access provided to various services, it is not appropriate for high volume/high value services where QR has monopoly power (such as bulk minerals concentrates services on the Mount Isa line) to receive such limited protections.

This should be resolved in the manner referred to in section 7.1 of this submission.

7.3 No 'End user' Access Agreement

The QCA (in respect of the central Queensland coal network) and the ACCC (in respect of the Hunter Valley) have considered it appropriate for end users to have a right to hold access rights directly themselves (without having to contract in relation to above rail operational matters).

The need for such arrangements is driven by issues, which equally apply in the Queensland Rail context, including:

- the promotion of greater competition in the above rail haulage market which such a structure provides (by the end user being able to change the nominated operator for particular access rights);
- the desirability of having the below rail access provider having a contractual relationship with both the end user (in respect of capacity and pricing) and the rail operator (in relation to operational issues); and

- removing the risk to access seeker's that they will lose their access rights when, through no wrongdoing of their own, the operator breaches an access agreement with the below rail access providers.

Xstrata considers that the same rights should be provided to end users in respect of the Queensland Rail network – particularly where the 2013 DAU provides for only 'Access Holders' or 'Operators' to have input into certain matters.

To reduce the regulatory burden imposed on Queensland Rail in preparing a standard access agreement under which an end user could directly hold the relevant access rights (and a related operational agreement for entry by haulage operators nominated to utilise those access rights), Xstrata would accept that it may be appropriate for the timing for development of such an agreement to occur to be after it is anticipated the new standard access agreements of this nature under the Aurizon Undertaking would be settled (as Xstrata anticipates the terms of those arrangements, or the alternative models discussed in developing those arrangements, may provide a useful starting point).

If the QCA considers there does not need to be an end user access agreement, then at a minimum there needs to be:

- a process for an end user to initiate a transfer of access rights from one operator to another (similar to what exists in clause 7.3.7 of the Aurizon Undertaking, but allowing for changes of operator in a substantially shorter timeframe); and
- rights for end users to be able to maintain access rights (even if only by nominating another operator to assume those rights) where an operator's default would otherwise cause such access rights to be terminated.

Xstrata submits the 2013 DAU should not be approved without a form of access agreement under which end users can contract access rights without having to assume primary responsibility for above rail matters.

8. Dangerous Goods

8.1 Scope of Dangerous Goods to which special liability regime applies

QR continues to propose a different liability regime in respect of all 'Dangerous Goods', albeit now only in respect of 'Mixed Trains'.

Xstrata acknowledges this is an improvement on the 2012 DAU. However, as Xstrata has previously noted, 'Dangerous Goods' includes a wide variety of goods which vary substantially in terms of the risks and potential damage which might result from an incident. It is not restricted to those goods which QR mentions in its submissions (such as explosives, cyanide and radioactive materials).

Train services relating to the following materials (which are currently operated on behalf of Xstrata) are treated as being services that carry dangerous goods:

- Mt Isa copper concentrate;
- Ernest Henry copper concentrate;

- Mt Isa zinc concentrate.

Each of those goods are currently considered Class 9 Miscellaneous Dangerous Goods. These copper and zinc concentrates do not explode on contact with oxygen or flame and are classified as dangerous goods solely because of the effects they can have if left in water for substantial periods of time (rather than any immediate fatal effects on humans or wildlife). If they were spilled from trains onto land there is no immediate serious health risk or risk of material property damage and the spill can generally be cleaned up using common equipment (such as a front loader) to recover the spilled product.

For a dangerous good to be a Class 9 Miscellaneous Dangerous Good it must not fall within the other 8 classes (explosives, gases, flammable liquids, flammable solids, oxidising agents and organic peroxides, toxic and infectious substances, radioactive substances and corrosive substances). It is fairly evident those other classes are of a generally higher risk profile than Class 9 Miscellaneous Dangerous Goods.

Xstrata considers the rationales QR has put forward for the differing risk treatment of Dangerous Goods (in terms of major loss or damage being caused due to the goods nature as a Dangerous Good) simply have no application to these minerals concentrates. Accordingly Xstrata submits that Class 9 Miscellaneous Dangerous Goods generally (or at least the specific minerals concentrates referred to above) should be removed from any special liability regime proposed to apply to dangerous goods (and therefore subject to the standard liability regime which applies to other train services).

Xstrata submits the 2013 DAU should not be approved without the Dangerous Goods liability regime proposed in the 2013 DAU (clause 11(a)(iv) Schedule C) not applying to Class 9 Miscellaneous Dangerous Goods generally, or at a minimum, any minerals concentrates within that Class.

8.2 Special liability regime should not apply where caused by QR

Irrespective of the scope of goods covered by the proposed 'Dangerous Goods' liability regime, Xstrata continues to consider it highly inappropriate for access holders or end users to be liable for any portion of the liability arising from an incident caused by the negligence or default of QR.

In accordance with the general principle that the risk should be assumed by the party best able to control the risk, it is clear that risks arising from QR's negligence or default should not be borne by other parties. Haulage operators or end users will not be able to gain insurance against QR's negligence or default.

Xstrata could accept as appropriate, subject to the amendments proposed in clause 8.1 and 8.2 of this submission being accepted, that access holders should be liable for the incremental loss on 'Mixed Trains' – *where the loss was not in any way caused or contributed to by Queensland Rail*.

Xstrata submits the 2013 DAU should not be approved without the Dangerous Goods liability regime proposed in the 2013 DAU (clause 11(a)(iv) Schedule C) being limited to only applying where the claim or loss was not in any way caused or contributed to, by any act or omission of Queensland Rail (or its officers, employees, contractors or agents).

9. Terms of Proposed Standard Access Agreement

9.1 Relevance to Xstrata

While Xstrata understands that the Standard Access Agreement (***SAA***) is proposed to only apply to coal train services on the Western System, Xstrata is making comments on the standard access agreement in the hope that:

- a standard access agreement will be developed for other types of train services ;
- if a standard access agreement is not developed for other types of train services, the principles in Schedule C will be amended to address the issues noted in this section 9; and
- as noted above, Xstrata anticipates that any QCA approved SAA will form the starting point for negotiations even for train services to which it does not apply – such that all potential access seekers have an interest in its terms.

9.2 Lack of renewal rights

Xstrata remains severely disappointed by the lack of renewal rights. This is a step backwards from the renewal provisions of the existing arrangements. As noted in the Initial Submission, the limited protections in clause 2.7.3 2013 DAU for extension of existing access rights are fundamentally flawed in their current form.

By damaging existing access holder's certainty of obtaining future access rights the proposed arrangements have the potential to impede investment in mine developments and industrial facilities which involve large sunk costs with a view to obtaining a return on equity across a period substantially longer than the likely term of an access agreement.

Xstrata submits the 2013 DAU should not be approved without the renewal rights being provided for as set out in section 6.3 of the Initial Submission.

9.3 Maintenance obligations

Xstrata is concerned that the maintenance obligation in clause 5.1 SAA is insufficient as it does not provide a sufficient objective standard against which maintenance performance can be measured (see by way of contrast, the current standard access agreements and the QR Network standard access agreements, which all also refer to the maintenance work being such that the infrastructure is consistent with the rollingstock interface standards).

The current QR drafting only requires that the Network be maintained in a condition 'such that the Operator can operate Train Services in accordance with this agreement'. In the context of an agreement which gives QR express and substantial rights to not provide access or only provide access subject to operational restrictions that can be imposed without consent of the access holder – reference to being able to operate 'in accordance with this agreement' provides absolutely no assurance of the network being maintained to any level.

Xstrata submits the 2013 DAU should not be approved without clause 5.1 of the SAA being replaced with the following:

5 Network management

5.1 Maintenance

Queensland Rail must carry out Maintenance Work on the Network such that:

(a) the Network is consistent with the Rollingstock Interface Standards;

(b) the Operator can operate Train Services in accordance with their Scheduled Times; and

(c) the Network is otherwise maintained in accordance with Prudent Practices, having regard to the train services contracted to access the various parts of the Network.

The suggested drafting would involve the deletion of the definition of 'Rail Infrastructure Operations' and utilise the following new defined terms:

Enhancement means the improvement, upgrading or other variation of the whole or any part of the Network which enhances the capabilities of the Network and any major replacement programme for elements of the Network.

Maintenance Work means any work involving repairs to, renewal, replacement and associated alternations or removal of, the whole or any part of the Network (other than Enhancements) and include any related inspections or investigation of all or any part of the Network.

Rollingstock Interface Standards means those rollingstock interface standards agreed as part of the Interface Risk Assessment and included in the Interface Risk Management.

9.4 Operational Constraints

The SAA included in the 2013 DAU involves deletion of the previous clause 5.2 which provided important protections to Access Holders in relation to the imposition of operational constraints.

Xstrata submits the 2013 DAU should not be approved without the following clause being included in the SAA (and equivalent principles in Schedule C):

5.2 Operational Constraints

Queensland Rail may impose such Operational Constraints as it considers necessary for the protection of any person or any property (including the Network) or to facilitate the performance of Maintenance Work or Enhancements, provided that in exercising its rights under this Clause 5.2 Queensland Rail must:

(a) use its reasonable endeavours to minimise disruption to Train Services (including giving as much notice as possible and, where possible, providing alternate Scheduled Times having regard to the Operator's and End User's reasonable requirements); and

(b) comply with the relevant procedures specified in the Interface Risk Management Plan.

The suggested drafting would involve utilising the following definition:

End User means the customer for haulage services provided by the Access Holder utilising the Access Rights.

9.5 Liabilities and Indemnities

Queensland Rail is proposing to substantially worsen the risk allocation and liability position for access holders compared to the current standard access agreements.

In particular:

- the indemnity in the current standard access agreement provided by Queensland Rail in respect of property damage and personal injury or death caused by the wilful default or deliberate or negligent acts or omissions of Queensland Rail or its staff has been removed;
- the indemnity provided by the operator is significantly wider than that previously provided – which was restricted to property damage and personal injury or death caused by the wilful default or negligence of the operator or its staff (10.1 SAA);
- very wide exclusions of liability, additional to those which are in the current standard access agreement (and which apply irrespective of whether caused by QR's own default or negligence), have been introduced in clause 11.2, including an exclusion of all liability for any loss of anything carried by a Train Service (11.2 SAA);
- the threshold below which claims cannot be made has increased to $500,000 (see 11.4 SAA);
- the exclusions from the circumstances in which Queensland Rail will be liable for non-provision of access makes the prospects of Queensland Rail ever being liable for non-provision of access extremely remote. In particular:
    - the requirement that 10% or more train services are not provided in a month before any claim can be made has the effect of only providing an access holder with a reasonable degree of certainty regarding 90% of its train services being provided. This threshold is also being proposed in addition to (not instead of) the financial limit before a claim can be made under clause 11.4(a). If Queensland Rail wishes to insist on this such that an access holder has only really securely contracted 90% of its train services, take or pay should never be paid unless less than 90% of contracted train services are utilised; and
    - where the 'Claim Event' does not constitute Queensland Rail Cause (see 11.6(e) SAA) liability is excluded. However part (d) of the definition of Queensland Rail Cause will result in QR not being liable for non-provision of access arising from QR's actions other than where those actions were complying with an obligation in accordance with the access agreement, access undertaking or applicable law.

Xstrata considers the previous risk allocations should be maintained (including having these specific changes reversed) as the existing risk profile was already a heavily

negotiated one that the QCA had determined to be appropriate in previous regulatory decisions. The fact that these liability provisions only directly impact on the operator rather than end users (under the current form of the SAA) does not protect end users as it merely means that the operator will be seeking to pass many of these risks to end users via back to back provisions in the haulage arrangement.

If the QCA considers a change in the risk profile is appropriate, then presumably there should also be a commensurate very substantial reduction in the revenue derived from access charges reflecting that reduced risk profile (by a substantial reduction in the 'Margin' permitted above the 'Undertaking Risk-free Rate').

Xstrata submits the 2013 DAU should not be approved unless the liability and indemnity provisions are returned to their current form under the existing SAA applicable to QR.

9.6 Rights of suspension

Xstrata considers that the qualifications on Queensland Rail's right to suspend access rights which exist in the current standard access agreement should be reinstated in clause 12.1 SAA. For example:

- there used to be a 7 day grace period in relation to failure to pay access charges – now administrative errors which result in late payment by 1 day can result in suspension without further notice; and
- the failure to comply with a train service description automatically provides a right to suspend when it previously only did so if it adversely affected other operators or caused or was likely to cause an increased risk to the safety of any person or material risk to property.

While Xstrata appreciates that suspension is obviously a lesser remedy than termination, which should be exercisable for events which may fall short of providing a right to terminate, it should still not be something that is exercised without cause due to the substantial disruption it will result in for the user's operations. Minor failures to comply with train service descriptions are not an abnormal occurrence, and it is unjustified and incredibly onerous to provide that such circumstances create a risk of suspension when it is not adversely affecting others or creating additional material risks.

In addition, where the access holder is a rail haulage operator – the end user should be given notice of suspension under clause 12 SAA at the same time as the operator (so the end user has an opportunity to seek to take action under the haulage agreement to require the operator to remedy the breach which has given Queensland Rail the right to suspend).

Xstrata submits the 2013 DAU should not be approved without the qualifications on QR's right to suspend access rights which exist in the current standard access agreement being reinstated in clause 12.1 SAA.

Clause 12.1 should also require QR to give notice of the suspension to the End User at the same time as the operator (so the end user has an opportunity to seek to take action under the haulage agreement to require the operator to remedy the breach which has given QR the right to suspend prior to a right of termination by QR arising).

9.7 Rights of termination

Xstrata has a number of concerns about the circumstances in which the access rights can be terminated. In particular:

- where the access holder is a rail haulage operator – the end user should be given notice of an default under clause 13.3 of the SAA (so it has an opportunity to seek to take action under the haulage agreement to require the operator to remedy the breach);
- an operator's failure to comply with a train service description is now an event which may give rise to termination (clause 13.1(h) SAA) without the qualifications in the previous standard access agreement about the failure having to be 'in any material respect', such that immaterial non-compliances which happen regularly create a risk of termination.
- an operator's suspension of its accreditation is an event which may give rise to termination (clause 13.1(j) SAA) when by its very nature the suspension may be lifted such that the access agreement should remain on foot (albeit be suspended) in the interim.

At a more general level, the risk of access rights being terminated due to operator non-compliance, is a serious business risk for end users like Xstrata that have made significant investments (in mining projects and industrial facilities and in entering take or pay rail haulage contracts and port user agreements) on the basis of certainty of access rights. This is not a risk that can be adequately mitigated through provisions of a haulage agreement. Consequently, if operator default is going to remain a cause for termination:

- there needs to be a right for end users such as Xstrata to maintain the existing access rights where the breach is an issue of the operator's conduct not being contributed to by the end user (potentially through a deemed assignment or by nominating a new haulage operator) – so that the innocent end user could recommence utilising the access rights upon having contracted a different haulage provider; and
- the requirement in the current standard access agreement that the operator first be suspended before any termination right is exercised should be reinstated.

Xstrata notes that many of these issues are removed if it was possible for end users to directly contract to obtain access rights as Xstrata has suggested.

Xstrata submits the 2013 DAU should not be approved without:

- clause 13.3 being amended to provide for QR to give any notices of default under clause 13.3 of the SAA to the end user as well (so it has an opportunity to seek to take action under the haulage agreement to require the operator to remedy the breach);
- the undertaking providing a right for end users such as Xstrata to maintain the existing access rights where the breach is an issue of the operator's conduct not being contributed to by the end user (potentially through a deemed assignment or by nominating a new haulage operator) – so that the innocent end user could

recommence utilising the access rights upon having contracted a different haulage provider;

- clause 13.1(h) SAA being amended to only apply to failures to comply with the Train Service Description 'in any material respect';
- clause 13.1(j) SAA being amended by deleting the referenced to 'suspended'; and
- including in clause 13.1 the requirement in the current standard access agreement that the operator first be suspended before any termination right is exercised.

9.8 Disputes being determined by QR

QR is proposing (clause 17.5 SAA) that it should be entitled to determine certain disputes to which it is a party. Clearly one party to a dispute being able to determine the outcome will not produce an independent determination.

Either this clause should be deleted in its entirety or any ability of QR to determine the dispute should be an interim determination which only applies until the dispute is subsequently finally resolved by a decision of an Expert, the Rail Safety Regulator, court order or agreement of the parties.

Xstrata submits the 2013 DAU should not be approved without either deleting clause 17.5 in its entirety or limiting any determination by QR to binding the Parties for any interim period unless and until the dispute is resolved by a decision of an Expert, the Rail Safety Regulator, court order or agreement of the parties.

9.9 Repair or replacement following a Force Majeure Event

QR is proposing that it have no obligation to fund the repair or replacement of any part of the network that is necessary for the Operator's train services and is damaged or destroyed by a Force Majeure Event (see clause 18(b) of Schedule C and 18.1(d) of the SAA).

Xstrata considers that Queensland Rail should be obliged to:

- fund all repair and reinstatement below an appropriate materiality threshold (either by dollar value or where the access charges payable in respect of train services utilising the relevant parts of the network make it economic to do so);
- apply recoveries under any insurance policies, or from claims against third parties, relating to the relevant force majeure event to fund the repair or reinstatement works (as where QR is making such recoveries rather than having to provide its own funding, it is difficult to see why they should not be used for reinstatement);
- otherwise, make the user funding process available to the Operator (and relevant End User(s)) in accordance with the provisions of the access undertaking).

Xstrata notes that an end user is in a much worse bargaining position to negotiate funding arrangements in relation to reinstatement (as opposed to an expansion), as the related investment in a mine or industrial facility will already be a sunk cost – such that without very robust user funding arrangements it can easily be held hostage by a monopoly below rail access provider asking for onerous terms before it conducts the repairs or replacement. Given the amount of financial costs that will be involved for users such as Xstrata in the

event of non-provision of access following a force majeure event, it is critical that the standard user funding agreement principles are available in this scenario (and as robust as they can be) such that an agreement for such funding can be quickly negotiated and executed so that the reinstatement works can begin as expeditiously as possible.

Xstrata submits the 2013 DAU should not be approved without:

- QR being obliged to fund all repair and reinstatement below an appropriate materiality threshold (either by dollar value or where the access charges payable in respect of train services utilising the relevant parts of the network make it economic to do so); and
- QR being obliged to apply recoveries under any insurance policies, or from claims against third parties, relating to the relevant force majeure event to fund the repair or reinstatement works;
- the user funding process under the undertaking being available to the Operator and relevant End Users where QR refuses to fund the repair or replacement of the Network following damage or destruction by a Force Majeure Event.

9.10 Termination for prolonged force majeure

Xstrata considers that the termination for force majeure provision (clause 18.2 SAA) should revert to the current standard access agreement wording which provides a right to the party not affected by the force majeure to terminate, as opposed to providing either party with a right to terminate.

Given that Queensland Rail has proposed that it not be required to conduct repair or rectification works after a force majeure event, and it would not be required to provide access during the force majeure event, it would seem that it would not be seriously adversely affected by the agreement continuing under a force majeure scenario. Whereas a user such as Xstrata will face significant costs (through take or pay haulage and port user arrangements) and a significant fall in revenue (through loss sales of product) and should have the right to require the agreement to continue if it was to incur those costs while there might be some prospect of rectifying the situation even if it will take more than 3 months to resolve the situation.

Xstrata submits the 2013 DAU should not be approved without clause 18.2 being amended so that it is only the party not affected by the Force Majeure Event which has a right to terminate.

9.11 Resumption threshold

Xstrata notes that QR is proposing amending the threshold for resumption to a failure to operate all Train Services on Scheduled Train Paths for 7 or more weeks out of any 12 consecutive weeks. Xstrata considers that a reasonable resumption threshold to also apply to services on the Mount Isa line.

In all cases Xstrata considers the Access Holder should have an opportunity to show a sustained demand for the relevant access rights (as applies under Queensland Rail's current access undertaking), so temporary difficulties do not have the potential to result in a

loss of access rights. Where the access agreement is a take or pay contract it is difficult to see the justification for not having some more protection for the end user for temporary non-utilisation of access rights where it does have a sustained demand for those access rights.

Xstrata submits the 2013 DAU should not be approved without:

- the resumption threshold in clause 19.1 of the SAA being replicated in the Schedule C principles (at least in relation to services on the Mount Isa line); and
- clause 19.1 and Schedule C providing for the access holder to have an opportunity to prevent resumption by demonstrating a sustained demand for the relevant access rights.

9.12 Representations and warranties regarding standard and suitability of the network

Clause 21(a)(viii) of the SAA seeks to require the Operator to represent a warranty as to the standard and suitability of the network and the ability of its rolling stock to safely interface with and operate on the Network.

If any party should be warranting as to the standard and suitability of the network it should be QR as the owner, operator and maintainer of the Network who is clearly best placed to assess its standard and suitability.

Xstrata submits the 2013 DAU should not be approved without clause 21(a)(viii) of the SAA being deleted (and potentially a similar representation or warranty should instead be given by QR to the Operator).

9.13 Queensland Rail Cause

As noted in section 7.3 of the Initial Submission, Xstrata is concerned with the widening of the definition of Queensland Rail Cause (and consequential narrowing of the circumstances in which QR does not receive take or pay revenue when it has not provide the contracted access).

Xstrata's particular concern is with the addition of 'or any other person', which has the result that where the non-provision of access is 'in any way' (i.e. irrespective of how minor the contribution) attributable to 'any other person' access holders will have to pay take or pay components of access charges. This effectively imposes nearly the entire risk of non-provision of access upon access holders, and removes important economic incentives for QR to ensure access is being provided as contracted.

QR has indicated this was only intended to cover where third parties were legally entitled to come onto the network without QR's control. Xstrata has its doubts as to the extent of such circumstances and considers the 'any other person' wording should just be deleted. However, if QR can provide the QCA with sufficient evidence of such rights existing, then the wording should be tightened to address that particular issue as set out below:

Xstrata submits the 2013 DAU should not be approved without the reference to 'or any person' in the definition of Queensland Rail Cause being deleted.

However, if QR can provide definite examples of this issue those words could instead be deleted and replaced with 'any person conducting Third Party Works over which QR has no legal or contractual rights to control the risks which may be posed in respect of availability of the Network'

10. Contacting Xstrata

If you have any queries in relation to this submission or Xstrata can provide any further assistance in relation to the process of considering the 2013 DAU please do not hesitate to contact Mark Roberts on [redacted] or Merv Sharkey on [redacted].